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No. 03-683

Supreme Court, U.S.
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In The
Supreme Court of the United States

ANGELA SAVARD, et al.,

Petitioners,

v.

STATE OF RHODE ISLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. Respondents' Brief Illustrates the Degree of "Legal Wrangling" Invited By the First Circuit's "Clear Guidance" Standard.

Respondents cite no case validating the blanket strip-searches of minor offense arrestees in which Respondents engaged, because there is none. Instead, Respondents misrepresent the holdings of cases clearly inapplicable to the issues at hand, contrive unduly restrictive interpretations of decisions that *are* applicable, and ignore the core line of authority that emasculates Respondents' central argument.

Respondents' Brief is a tortured effort to defend a decision immunizing them from the consequences that should follow from their flagrant and systematic violation of clearly established law prohibiting strip-searches of minor offense arrestees when there is no reasonable suspicion that they are carrying or concealing weapons or contraband. This is precisely the type of "legal wrangling" the Court hoped to avoid by adopting the "fair warning" standard in *Hope v. Pelzer*, 536 U.S. 730, 742 (2002), and which is now encouraged by the "clear guidance" standard articulated by the First Circuit in this case.

II. Respondents Have Offered No Authority That Legitimizes Blanket Strip-Searches of Minor Offense Arrestees Without Reasonable Suspicion.

The authorities cited by Respondents to justify their blanket strip-searches of Petitioners involve post-arraignment strip-searches of dangerous inmates, and

strip-searches of persons arrested for felonies or offenses typically associated with possession of weapons or contraband. These authorities are clearly inapplicable to the issues at hand, and did not create a "fork in the road" that Respondents could travel with impunity.

Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983), did not involve pre-arraignment strip-searches of minor offense arrestees. Justice Breyer's decision in that case made clear that it concerned *post-arraignment* searches of inmates in a "special security area" *within* a maximum security facility, "the only such institution in Massachusetts designed to hold those inmates who posed the greatest risks to society and to each other." *Id.* at 887. The inmates searched in *Arruda* were considered so dangerous that they were segregated from other inmates in the facility because their "continued retention in the general institution population [was] detrimental to the program of the institution." *Id.* No reasonable official reading *Arruda* could conclude that it would have any applicability whatsoever to a blanket strip-search policy applied to minor offense arrestees prior to their arraignment.

Dufrin v. Spreen, 712 F.2d 1084 (6th Cir. 1983), involved a plaintiff arrested for felonious assault, not a minor offense. The court in *Dufrin* specifically distinguished the circumstances of that case from those "involv[ing] misdemeanors, traffic offenses, or similar minor offenses not normally associated with weapons or contraband." *Id.* at 1088. Likewise, *Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir. 1987), stands merely for the proposition that a "strip-search policy was constitutional as applied to a . . . jail detainee who had been arrested and charged with 'menacing,' an offense normally associated with weapons and other contraband." *Masters v. Crouch*,

872 F.2d 1248, 1256 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989). Of course, the Sixth Circuit's opinion in *Masters* antedated its opinions in both *Dufrin* and *Dobrowolskyj*, and held:

> [I]t was clearly established *in October, 1986* that authorities may not strip-search persons arrested for traffic violations and non-violent minor offenses *solely because such persons ultimately intermingle with the general population at a jail* when there were no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail.

Id. 872 F.2d at 1255 (emphasis added).

While it cannot be determined from a review of the District Court's opinion in *Roscom v. City of Chicago*, 570 F. Supp. 1259 (N.D. Ill. 1983), whether the pre-trial detainee in that case had been arrested for a minor offense or a felony, it remains the law in the Seventh Circuit that strip-searches of minor offense arrestees are barred absent a reasonable belief that they will reveal weapons or contraband. *See Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983).

Respondents also err grievously in relying upon Eleventh Circuit strip-search authority. Respondents cite *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001),[1] and *Evans v. City of Zebulon*, 2003 WL 22707338 (11th Cir. November 13, 2003), to support their claim "that even as of 2001 the

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[1] Respondents erroneously characterize *Wilson* as a "post-*Hope* decision." Respondents' Brief in Opp'n at 14. The Eleventh Circuit's decision in *Wilson* issued in 2001. This Court decided *Hope* in 2002.

law was unclear that reasonable suspicion was required to conduct a strip-search or body cavity search of an arrestee detained in the general jail population." (Respondents' Brief in Opp'n at 21-22.) Respondents neglect that the Eleventh Circuit does not look to the law outside its own circuit to determine what is clearly established law. *Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) ("As we have stated, only Supreme Court cases, Eleventh Circuit case law, and [state] Supreme Court case law can 'clearly establish' law within this Circuit.") Thus, the Eleventh Circuit ignores not just a consensus of persuasive authority, but the *plethora* of authority from other circuits extending back over two decades that is unanimous in its condemnation of blanket strip-searches of minor offense arrestees when there is no reasonable suspicion that they are carrying or concealing weapons or contraband. *Weber v. Dell*, 804 F.2d 796, 802 (2nd Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); *Stewart v. Lubbock County, Texas*, 767 F.2d 153, 156-57 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *Masters v. Crouch*, 872 F.2d 1248, 1257 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739, 741-42 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984).

By contrast, the First Circuit looks "not only to Supreme Court precedent but to all available case law" to determine whether the contours of a constitutional right are clearly established. *Hatch v. Department for Children*, 274 F.3d 12, 23 (1st Cir. 2001). Moreover, in its 1997 decision in *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997),

which predated both Petitioners' strip-searches and the Eleventh Circuit authority cited in Respondents' Brief, the First Circuit recognized that clearly established law required that "[a] strip and visual body cavity search of an arrestee must be justified, *at the least*, by a reasonable suspicion." *Id.* at 5, 7 (emphasis added).

In addition to their reliance on clearly inapplicable authority, Respondents engage in an unduly restrictive interpretation of authority that is clearly applicable to Petitioners' circumstances. Perhaps the best example is Respondents' treatment of *Swain*, which they represent "requires a showing of reasonable suspicion to strip search an individual *in a single cell municipal jail*." (Respondents' Brief in Opp'n at 3) (emphasis added). There is nothing in the First Circuit's decision in *Swain* to suggest that it should apply only to cases involving a single cell municipal jail. To the contrary, it is clear from the First Circuit's decision in *Swain* that it was joining the other federal circuit courts of appeal that had unanimously condemned strip-searches of minor offense arrestees when there exists no reasonable suspicion that they are carrying or concealing weapons or contraband. *Swain*, 117 F.3d at 7.

Even more appalling is Respondents' failure to acknowledge – much less address – the fact that the courts have repeatedly and unanimously rejected mere commingling with more serious offenders as a justification for strip-searching minor offense arrestees. *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989); *Walsh v. Franco*, 849 F.2d 66, 69 (2nd Cir. 1988); *Giles v. Ackerman*, 746 F.2d 614, 619 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984). These cases carve a

clear path right between Respondents' figurative "fork in the road" that should have lead them to the inescapable conclusion that their blanket strip-searches of Petitioners would not pass constitutional muster.

III. Respondents Have Offered No Authority Legitimizing a Distinction Between a "Jail" and a "Maximum Security Facility" in the Circumstances of This Case.

There is no record evidence to support Respondents' assertion that the cases cited in support of the Petition "involved smaller, less secure facilities" than the ACI. (Respondents' Brief in Opp'n at 5.) At a time when "jails" house convicted felons, and a "maximum security facility" like the ACI holds pretrial detainees, there is little practical distinction between the terms, particularly as it relates to the protection of the Fourth Amendment rights of minor offense arrestees. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 546 n. 28 (1979); *Shain v. Ellison*, 273 F.3d 56, 72 n. 3 (2nd Cir. 2001) (J. Cabranes dissenting).

Respondents state that "co-mingling with a general population and the security designation of the facility has been the lynchpin in determining whether a strip-search is constitutionally permissible." (Respondents' Brief in Opp'n at 21.) But the ACI's designation as a "maximum security facility" has no relevance absent commingling. Had Petitioners been segregated from more serious offenders, there would have been no security interest to justify their strip-search; merely calling the ACI a "maximum security facility" does not, of itself, create the circumstances that would justify the strip-search of a minor offense arrestee. And as set forth above, mere commingling has never been

found by any court to justify the strip-search of a minor offense arrestee.

IV. Respondents Are Not Entitled to Qualified Immunity Absent a "Maximum Security Facility Exception" to the General Rule Barring Blanket Strip-Searches of Minor Offense Arrestees.

Despite the general rule barring blanket strip-searches of minor offense arrestees, Petitioners' claims were dismissed because they could not provide the First Circuit with a case in which such a rule was applied to a "maximum security facility." The result was the first decision of a federal circuit court of appeal granting qualified immunity for blanket strip-searches of minor offense arrestees. *See Chapman*, 989 F.2d at 398 ("[N]o circuit case has upheld the grant of qualified immunity when asserted against a claim based on an across-the-board policy of strip searching minor offense detainees.").

This was not a burden that should have been imposed on Petitioners. Rather, it should have been *Respondents'* burden to furnish the Court with some authority showing that a maximum security facility enjoyed an exception to the clearly established law barring blanket strip-searches of minor offense arrestees. Placing such a burden on Respondents is essential to give meaning to *Hope*'s fair warning standard by requiring – particularly in a case involving a written policy and not a split-second decision – that government officials know the law and respect individuals' civil liberties in the absence of some authority

creating an exception to clearly established general rules that are infringed by the officials' conduct.

CONCLUSION

WHEREFORE, Petitioners respectfully request that their Petition be granted.

Respectfully submitted,

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